IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs October 15, 2008

# STATE OF TENNESSEE v. JAMES EDWARD MCCLAIN, III

**Appeal from the Criminal Court for Loudon County**
**Nos. 11199 E. Eugene Eblen, Judge**

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**No. E2007-02131-CCA-R3-CD - Filed March 11, 2009**

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Appellant, James McClain, pled guilty to several charges in several different cases in Loudon County, including theft of property between $1,000 and $10,000, theft of property between $500 and $1,000, two counts of aggravated burglary, theft of property between $10,000 and $60,000, and burglary. These convictions resulted in a total effective sentence of five years. The sentences were to run consecutively to Appellant's prior sentences from Knox County. At a sentencing hearing, the trial court denied Appellant's request for alternative sentencing. On appeal, Appellant seeks a review of the trial court's decision to deny probation. We determine that the trial court properly denied probation to Appellant, whose lengthy criminal history evinces a clear failure of rehabilitation through measures less restrictive than confinement. Accordingly, the judgments of the trial court are affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.**

JERRY L. SMITH, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and ROBERT W. WEDEMEYER, JJ., joined.

Robert L. Vogel, Knoxville, Tennessee, for the appellant, James Edward McClain, III.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; J. Scott McCluen, District Attorney General, and Frank Harvey, Assistant District Attorney General, for the appellant, State of Tennessee.

## OPINION

Appellant pled guilty to three counts of theft, two counts of burglary and two counts of aggravated burglary in exchange for an effective five year sentence.

At the plea hearing, the parties stipulated to the facts. In June of 2005, Appellant broke into Melton Hill Market with the intent of committing a theft. In August of 2005, Appellant broke into

the home of Janice and Darryl Abston with the intent to commit a theft and took personal property valued in excess of $10,000. Appellant also broke into the home of Elizabeth Kender with the intent to commit a theft and removed property valued in excess of $1,000. Finally, on August 21, 2005, Appellant stole a Ford F-250 pickup truck belonging to Robert Robinette. Appellant agreed that the facts were substantially correct.

At the sentencing hearing, the parties agreed that Appellant was required by law to serve his five-year sentence "consecutive to current TDOC sentences" because he was on parole when the current offenses occurred. Counsel for Appellant informed the trial court that Appellant had "done quite a bit [of positive things] while he [had] been incarcerated," including: (1) completing a residential electronics apprentice course; (2) receiving his institutional GED; (3) taking the legal aid test and being given permission to assist other inmates in the law library; (4) completing a commercial foods course; and (5) completing a pre-release class. Additionally, Appellant received an honorary credential through Universal Light Church and had been enrolled in college with an associate program in psychology. Counsel for Appellant also informed the trial court that Appellant and other inmates had formed a group that created a trust fund that assists former inmates in paying rent for half-way houses and other things. Appellant was also involved in the Try Care program which helps former inmates get a job when they get out of prison. After hearing the proof from Appellant, counsel for the State took the position that Appellant was not an appropriate candidate for anything other than a fully incarcerative sentence.

At the conclusion of the sentencing hearing, the trial court denied all forms of alternative sentencing, finding that "there's a reason that [Appellant's sentences] are consecutive. With that reason I can't put him on probation with these other things and doing this while he is on parole. It will just have to run consecutive."

Appellant now seeks a review of the trial court's denial of alternative sentencing.

*Analysis*

On appeal, Appellant argues that the trial court improperly denied his request for a probationary sentence. Specifically, Appellant argues that the trial court "did not give enough consideration to the clear demonstration of [Appellant's] willingness to be rehabilitated." Appellant also argues that the State opposed his request for probation after he was led to believe that the State would not oppose his request for probation. The State contends, on the other hand, that the trial court properly denied a probationary sentence. Further, the State asserts that Appellant's claim that the State somehow "breached" the plea agreement is unsupported by the record.

*Plea Agreement*

There is no absolute right to a plea agreement and a trial court is not obligated to accept a plea agreement. *State v. Turner*, 713 S.W.2d 327, 329 (Tenn. Crim. App. 1986) (citing *Santobello v. New York*, 404 U.S. 257 (1971); *Williams v. State*, 491 S.W.2d 862, 867 (Tenn. Crim. App. 1972)).

A plea agreement can be scrutinized on appeal by this Court where it appears that the enforcement of the agreement would deny the accused a fundamental constitutional right or be unconscionable and not deserving of judicial approval. *See Richardson v. State*, 671 S.W.2d 865, 866 (Tenn. Crim. App. 1984). In order to determine if a breach of the plea bargain agreement has occurred, this Court should review the entry of the plea agreement in order to ascertain the parties' understanding as to the terms of the agreement. *See United States v. Barrett*, 890 F.2d 855, 864 (6th Cir. 1989).

When we review the transcript of the plea agreement hearing, we find no proof to support Appellant's claim that the State ever agreed to support Appellant's request for probation. In fact, the prosecutor informed the trial court at the guilty plea submission hearing that "in all these cases [Appellant] will be applying to Your Honor as to how these will be served after the expiration of that TDOC [sentence]." Further, even if the State had agreed to support Appellant's request for a probationary sentence, the manner of service of the sentence would have been the decision of the trial court. This issue is without merit.

*Denial of Alternative Sentence*

"When reviewing sentencing issues . . . the appellate court shall conduct a de novo review on the record of the issues. The review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d). "However, the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). In conducting our review, we must consider the defendant's potential for rehabilitation, the trial and sentencing hearing evidence, the pre-sentence report, the sentencing principles, sentencing alternative arguments, the nature and character of the offense, the enhancing and mitigating factors, and the defendant's statements. T.C.A. §§ 40-35-103(5), -210(b); *Ashby*, 823 S.W.2d at 169. We are to also recognize that the defendant bears "the burden of showing that the sentence is improper." *Ashby*, 823 S.W.2d at 169.

With regard to alternative sentencing, Tennessee Code Annotated section 40-35-102(5) provides as follows:

> In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and

> evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration . . . .

A defendant who does not fall within this class of offenders:

> and who is an especially mitigated offender or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. A court shall consider, but is not bound by, this advisory sentencing guideline.

T.C.A. § 40-35-102(6); *see also State v. Carter*, 254 S.W.3d 335, 347 (Tenn. 2008). With certain exceptions, a defendant who committed offenses prior to June 7, 2005, is eligible for probation if the sentence actually imposed is eight years or less. T.C.A. § 40-35-303(a) (2003). For offenses committed on or after June 7, 2005, a defendant is eligible for probation if the sentence actually imposed is ten years or less. *See* T.C.A. § 40-35-303(a) (2006).

All offenders who meet the criteria for alternative sentencing are not entitled to relief; instead, sentencing issues must be determined by the facts and circumstances of each case. *See State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987) (citing *State v. Moss*, 727 S.W.2d 229, 235 (Tenn. 1986)). Even if a defendant is a favorable candidate for alternative sentencing under Tennessee Code Annotated section 40-35-102(6), a trial court may deny an alternative sentence because:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant . . . .

T.C.A. § 40-35-103(1)(A)-(C). In choosing among possible sentencing alternatives, the trial court should also consider Tennessee Code Annotated section 40-35-103(5), which states, in pertinent part, "[t]he potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed." T.C.A. § 40-35-103(5); *see also State v. Dowdy*, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994). The trial court may consider a defendant's untruthfulness and lack of candor as they relate to the potential for rehabilitation. *See State v. Nunley*, 22 S.W.3d 282, 289 (Tenn. Crim. App. 1999); *see also State v. Bunch*, 646 S.W.2d 158, 160-61 (Tenn. 1983); *State v. Zeolia*, 928 S.W.2d 457, 463 (Tenn. Crim. App. 1996); *State v. Williamson*, 919 S.W.2d 69, 84 (Tenn. Crim. App. 1995); *Dowdy*, 894 S.W.2d at 305-06.

As noted earlier, Appellant pled guilty to three counts of theft, two counts of burglary, and two counts of aggravated burglary, all Class C, D, or E felonies. He was sentenced to less than ten years incarceration for the offenses, so he is eligible for alternative sentencing including probation. *See* T.C.A. §§ 40-35-303(a). However, we point out that the above considerations are advisory only. *See* T.C.A. § 40-35-102(6) (2006).

Although Appellant's achievements in bettering himself are laudable, his criminal history contains eighteen prior convictions for aggravated burglary, along with prior convictions for burglary of a habitation and misdemeanor theft. Appellant's criminal record alone supports the denial of alternative sentencing. *See* T.C.A. § 40-35-103(1)(A). Further, Appellant received a parole violation on a prior conviction following the commission of the offenses in this case. Appellant also had a prior community corrections revocation. Thus, it appears that measures less restrictive than confinement have been applied unsuccessfully to Appellant. This failure to abide by a previously granted alternative sentence further supports the denial of an alternative sentence in this case. *See* T.C.A. § 40-35-103(1)(C). Consequently, we affirm the judgment of the trial court ordering Appellant to serve his sentences in incarceration.

*Conclusion*

For the foregoing reasons, we affirm the judgments of the trial court.

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JERRY L. SMITH, JUDGE